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NO. 71-28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

D. H. OVERMYER CO., INC. AND D. H. OVERMYER CO., INC. (A Mississippi Corporation),

Petitioners,

versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, D. H. Overmyer Co., Inc., an Ohio Corporation, plaintiff below, and D. H. Overmyer Co., Inc., a Mississippi Corporation, third-party defendant below, (both sometimes referred to herein in the singular as *Overmyer,* their interests in the subject matter of this suit being identical) respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review the judgment of that Court, dated April 5, 1971, affirming the judgment of the United States District Court for the Southern District

of Mississippi, Jackson Division, entered on July 7, 1970, granting respondent's motion for summary judgment as to counts one and two of the complaint and also adjudicating against petitioners on respondent's counterclaim after hearing on such counterclaim.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 440 F.2d 1213 (Advance Sheet), and a copy thereof appears as Appendix A hereto. The Findings and Conclusions of the United States District Court on which that Court's judgment appealed from and affirmed by said Court of Appeals was based has not been reported but appears as Appendix D hereto.

JURISDICTION

The date of the judgment of said Court of Appeals (Appendix B) sought to be reviewed herein, which affirmed the District Court's judgment, is April 5, 1971.

On April 20, 1971, petitioners herein were granted an extension of time to and including May 10, 1971, within which to file a petition for rehearing in said Court of Appeals. The petition for rehearing, timely filed, was denied by order dated May 20, 1971 (Appendix C).

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence before the Court on respondent's motion for summary judgment presents a material issue of fact as to whether a valid and binding compromise settlement and accord and satisfaction of the claims of Overmyer contained in the first and second

counts of its complaint were ever consummated, and if so, whether the Seventh Amendment to the United States Constitution has been violated by the granting of a summary judgment to respondent against petitioners on said first and second counts of the complaint under Rule 56, Federal Rules of Civil Procedure, and denying them a trial by jury.

2. Whether Overmyer is entitled to recover overpayments to respondent made under the influence of a mistake of an existing material fact.

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE INVOLVED

The constitutional provision involved is the Seventh Amendment to the United States Constitution, which reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The rule giving the District Court authority to render summary judgment in proper cases is Rule 56 of the Federal Rules of Civil Procedure. The pertinent part of said Rule 56 (c) is as follows:

> ". . . The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . ."

Said Rule 56 is set out verbatim in Appendix F hereto.

STATEMENT OF THE CASE

Green & White Construction Company was the prime contractor for the construction of a warehouse in Jackson, Mississippi for Overmyer. As such prime contractor, Green & White, on July 26, 1966, entered into Subcontract No. 2722 with respondent, John T. Loflin, whereby respondent was to do certain site preparation work (R. 9). On October 8, 1966, Subcontract No. 2736 was entered into by and between the same parties, whereby respondent was to do certain other site preparation and paving work (R. 16).

On May 31, 1967, Green & White assigned all claims which it might have under said subcontracts to Overmyer. (R. 14). Subsequently, upon the learning that it, acting under a mistake of fact, had overpaid respondent under both subcontracts, Overmyer filed suit in Federal Court to recover the amount of such overpayments.

Inasmuch as the third count of the complaint was dismissed at the plaintiff's request before judgment, and thus no adjudication was made thereasto, we do not concern ourselves with said third count in this petition.

Since the repayments sought by the complaint were denied by summary judgment without a trial, and the counterclaim sought by respondent was granted him after a brief uncontested hearing, the remaining facts of this case can perhaps best be stated by a discussion of the pleadings, interrogatories, answers to interrogatories, affidavits, exhibits and other documents appearing in the record.

The complaint (R. 3) filed by Overmyer is in three counts, the first count seeking recovery for overpayment made on said Subcontract No. 2722 and the second count

seeking recovery for overpayment made under said Subcontract No. 2736. Respondent filed an answer (R. 72), and an amendment to answer (R. 135), and in defense of said counts one and two of the complaint contended that plaintiff was barred, estopped and prohibited by law from bringing such action for alleged overpayments because Loflin, Green & White and Overmyer had entered into an alleged compromise settlement and an accord and satisfaction with reference to the said subject matter on May 31, 1967, and because any such overpayment was a voluntary payment and could not be recovered back.

Respondent, by way of counterclaim (R. 112) alleged that Overmyer had, as a part of the alleged compromise settlement and accord and satisfaction, executed in favor of respondent Loflin a promissory note (R. 115) in the amount of $20,094.48 on May 31, 1967 and made payments to him on said note through January 30, 1968, after which time there was default by Overmyer leaving it indebted to Loflin on said note for $16,831.68 plus interest. The plaintiff [Overmyer (Ohio)] and the third-party defendant [Overmyer (Miss.)] answered the note counterclaim (R. 119, 128, respectively), admitting the execution of the note and the default in payment of the note and the amount owing, but denying liability thereon because of the set-offs alleged in the complaint.

Respondent filed a motion for summary judgment in his favor as the defendant named in the complaint and in his favor on his counterclaim against Overmyer (R. 147), attaching as exhibits thereto his own affidavit with exhibits (R. 151), a certified copy of a petition to intervene which Loflin had previously filed in a proceeding against Overmyer and others in the Chancery Court of the First Judicial District of Hinds County, Mississippi,

with exhibits attached thereto (R. 162), a certified copy of Loflin's motion to dismiss petition of intervention (R. 193), and a certified copy of the order dismissing petition of intervenor (R. 195).

Overmyer filed a response (R. 197), and supporting affidavit of Kenneth P. O'Brien, Assistant Secretary of Green & White (R. 199), who deposed on personal knowledge concerning the transactions in controversy between Loflin, Overmyer and Green & White. Mr. O'Brien attached exhibits to his affidavit (R. 206-258) and referred therein to interrogatories propounded to Loflin (R. 79) and answer to interrogatories propounded to Loflin (R. 83). Loflin filed a counteraffidavit with exhibits (R. 263).

The District Court, after considering the above mentioned portions of the record, entered an order (R. 276) sustaining Loflin's motion for summary judgment in his favor on counts one and two of Overmyer's complaint and overruling Loflin's motion for summary judgment as to the third count of the complaint and as to Loflin's counterclaim. Overmyer then moved the District Court to dismiss the third count of its complaint without prejudice (R. 259) in order that an appealable judgment might be entered herein, and the District Court granted the same (R. 278). The District Court then entered its finds and conclusions (R. 280) and, after a brief uncontested trial without a jury, found for Loflin on his counterclaim against Overmyer and entered its final judgment (R. 287) for Loflin and against Overmyer on the first and second counts of Overmyer's complaint against Loflin. The Court of Appeals subsequently affirmed the District Court's judgment, and we respectfully submit that it committed error in so

doing. It is a review of this judgment of said Court of Appeals which is sought by this petition.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS IN THAT IT FAILS TO RECOGNIZE THAT THE EVIDENCE BEFORE THE COURT ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT PRESENTS A MATERIAL ISSUE OF FACT AS TO WHETHER A VALID AND BINDING COMPROMISE SETTLEMENT AND ACCORD AND SATISFACTION OF THE CLAIMS OF OVERMYER CONTAINED IN THE FIRST AND SECOND COUNTS OF ITS COMPLAINT WERE CONSUMMATED. THEREFORE, IN THUS FAILING TO RECOGNIZE THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AND THEREUPON GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE COURT HAS DENIED PETITIONERS' RIGHT TO A TRIAL BY JURY AS GUARANTEED THEM BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

We desire to make it clear at the outset that we are not attacking the constitutionality of Rule 56 of the Federal Rules of Civil Procedure which deals with the granting of summary judgment. We agree that summary judgments may properly be granted where there is no genuine issue of material fact. It is our contention that a genuine issue of material fact was present in the instant case when the Court granted the respondent's motion for summary judgment and, therefore, the sum-

mary judgment was improperly granted and petitioners' constitutional right to a trial by jury was denied them.

The first count of Overmyer's complaint herein (R. 3) alleges that, pursuant to the terms of Subcontract No. 2722 (R. 9) and change order amendment thereto (R. 13), Loflin should have been paid $53,147.78, but that, through inadvertence and mistake, Overmyer and Green & White paid him $72,230.50 on said subcontract, and that Overmyer and Green & White were induced to make these overpayments amounting to $19,082.72 and did make the same in reliance upon Loflin's representations to them that such payments were due and owing. Similarly, the second count of Overmyer's complaint alleges that under Subcontract No. 2736 (R. 16) Loflin was entitled to consideration of $18,600.00, but that through inadvertence and mistake Overmyer and Green & White paid him $23,299.30 and that they were induced to make these overpayments of $4,699.30 by Loflin who represented to them that such payments were due and owing.

Both subcontracts, by the terms of identical paragraphs 7 thereof, expressly preclude payment to respondent for any work done pursuant to any oral change order or agreement. Said identical paragraphs 7 (R. 10 and R. 17) read as follows:

> "The Subcontractor shall make no claim for extra or additional work unless the same shall be done in pursuance of a written change order executed by the Subcontractor, General Contractor and Owner.
>
> "In event the Subcontractor claims any work directed to be performed by it involves extra or additional cost, it shall within three days after receipt of such direction and before proceeding therewith make written claim therefor giving in detail the basis of its

contention and a detailed breakdown showing separately the additional cost of labor and material. Upon written direction of the General Contractor, Subcontractor shall promptly proceed with such work, and should the General Contractor rule said work is not extra or additional, the Subcontractor may reserve its claim therefor by written protest given within three days after notice to proceed. Claims for damages by reason of any act or omission of the General Contractor shall be made in writing within three days after the initiation of such act or omission. Failure to make written notice of claim within the time and in the manner as herein provided shall constitute a waiver thereof by Subcontractor and no recovery therefor can be had."

Accordingly, any work performed by Loflin pursuant to alleged oral agreements are not chargeable to Green & White or to Overmyer.

Loflin's first answer (R. 72) to Overmyer's complaint alleges that numerous oral change orders to Subcontract No. 2722 were authorized by Green & White's building superintendent and construction superintendent (although both of the subcontracts by their own terms as aforesaid, preclude oral change orders as explained in the affidavit of Kenneth P. O'Brien (R. 199), that he should have been paid $73,205.20 for work done pursuant to Subcontract No. 2722 and $25,717.60 for work done pursuant to Subcontract No. 2736, and that he was accordingly underpaid in the amount of $994.70 on the former subcontract and $2,418.30 on the latter. However, with his answer to interrogatories (R. 83) Loflin files invoices submitted by him under Subcontract No. 2722 which total $72,230.50, the exact amount which he was paid under said contract, and these invoices include

numerous charges unauthorized under his said subcontract (as more fully set out in Mr. O'Brien's affidavit (R. 199) and exhibits thereto). Loflin also states in answer No. 1. (a) (R. 83) that in invoicing 2,049 yards of additional select fill for which his subcontract authorized him to charge $1.70 per cubic yard, he charges only $2,508.60 rather than the correct amount of $3,483.30. Apparently this is Loflin's basis for his contention that he was underpaid $974.70 on Subcontract No. 2722. His invoices on this subcontract however (R. 86-96) reveal that Loflin charged a total of $37,483.30 for 22,049 cubic yards of select fill and these figures convert to the exact unit price of $1.70 per cubic yard authorized by said subcontract. With respect to Subcontract No. 2736, Loflin states in answer No. 2. (a) (R. 84) that he invoiced for a total of $25,717.60, and then adjusted this figure to $23,299.30 "because blacktop was not placed over a part of the area." The invoices which he attached as Exhibit 3 to his answer to interrogatories (R. 98-99) and represented to be the invoices rendered relative to services performed under Subcontract No. 2736, total $25,969.91. In other words, Loflin, at the time he filed his answer to interrogatories (R. 83), was unable to show that he was underpaid at all on Subcontract No. 2722; indicated that his charges for work done pursuant to Subcontract No. 2736 were reduced because the amount of work required thereunder was reduced; produced invoices on Subcontract No. 2736 totaling more than he had previously stated in his answer that he was entitled to under said Subcontract No. 2736; and was unable to produce authorized written change orders authorizing additional work under either of said subcontracts.

At a later date, Loflin filed his counterclaim (R. 112) against Overmyer; then, still later, filed his second amended answer (R. 135) and motion for summary judgment (R. 147), alleging for the first time, in both of these pleadings, that Overmyer's claims for overpayments contained in the first and second counts of its complaint were barred by an alleged compromise settlement and accord and satisfaction of said claims purportedly entered into by Overmyer, Green & White and Loflin on May 31, 1967. In support of these two pleadings, various exhibits were attached including an affidavit (R. 151) of Loflin; a certified copy of the previously mentioned petition to intervene (R. 162) which Loflin filed in a chancery proceeding against Overmyer, Green & White and others on January 16, 1967; a copy of a letter from Loflin's attorney to Overmyer's attorney dated March 30, 1967 (R. 160); an agreement (R. 139) dated May 31, 1967, executed by Loflin, acknowledging receipt of an installment promissory note from Overmyer in the amount of $20,090.48 in settlement of all indebtednesses owed Loflin by Green & White and Overmyer and agreeing to refrain from commencing or prosecuting any suits against them and to release and remove any liens he may have previously filed against Overmyer in respect to the indebtedness evidenced by the note; a copy of a waiver of lien (R. 141) executed by Loflin on May 31, 1967, waiving and releasing all liens and claims he had by virtue of performing services under the subcontracts in question against Green & White, Overmyer, Deposit Guaranty National Bank and the premises where such services were performed; and a copy of an order (R. 144) dismissing with prejudice the above mentioned petition to intervene (R. 162), said order being dated May 31, 1967.

Loflin's motion for summary judgment (R. 147) is supported by his affidavit (R. 151) and attached exhibits outlined above, and through these documents as well as in his said second amended answer (R. 135) and exhibits thereto attached, he attempts to prove by mutually exclusive allegations that Overmyer and Green & White on the one hand knew of, authorized, approved and agreed to pay for all of the extra work performed under both of the subcontracts involved in this litigation, and, on the other hand, he also alleges a compromise settlement and accord and satisfaction of "disputes" between these same parties. For example, in his affidavit, Loflin states at R. 153, 154:

> "The procedure followed during the course of the work involved Affiant invoicing the Contractor, Green & White, on a monthly basis for work done during the preceding period. Affiant followed a procedure of personally submitting his invoice for each month's work to W. A. Weathersby, the Construction Superintendent for the Contractor, Green & White . . . *There was never, however, any disagreement or dispute during the course of the project and even in the final settlement concerning the Contractor's liability for this work, the Contractor having throughout recognized the obligation resting upon him created by the oral change orders.*" (Emphasis supplied)

Compare the above quoted statement with the following statement found in Loflin's Second Amended Answer at R. 136:

> "That on May 3, 1967, there was paid this Defendant on said account the sum of $9,352.31, leaving a balance owing for said work in the amount of $32,762.08, *which balance the Plaintiff and Green & White*

Construction Company, Inc. disputed. That all of said parties were then represented by attorneys and after settlement conferences and negotiations between said parties, a compromise and settlement agreement was reached . . . Pursuant to said agreement for compromise and settlement and accord and satisfaction of his claim and pending suit for balance owed to him for said work and in compromise and settlement and accord and satisfaction of *all disputes* between said parties with reference to said subject matter . . . ." (Emphasis supplied)

Overmyer filed its response (R. 197) to Loflin's motion for summary judgment, and attached thereto the previously mentioned supporting affidavit of Kenneth P. O'Brien (R. 199) and exhibits thereto, and Loflin filed a counteraffidavit (R. 263). Kenneth P. O'Brien states in his affidavit at R. 202 that Loflin's invoices for Subcontract No. 2736 (totaling $12,019.91) dated March 30, 1967 (R. 224) were never received by Green & White and that Green & White was not aware of their existence until they were attached as an exhibit to Loflin's answer to interrogatories (R. 99). O'Brien further pointed out in his affidavit at R. 200 that Loflin erroneously invoiced Green & White for certain labor and equipment rental which Loflin had contracted to furnish, and further at R. 201 that Loflin had billed Green & White for 22,049 cubic yards of imported fill; whereas only approximately 16,300 cubic yards of imported fill was necessary to achieve compliance with the contract, thus resulting in an apparent overbilling by Loflin of Green & White of $9,773.30. O'Brien explained in his affidavit at R. 202 that:

". . . any progress payments made to Defendant with reference to the extra work on subcontract No.

2722 as to which there was no written change order was made through mistake and inadvertence and only because during the time said progress payments were being made they did not exceed the total contract price."

Upon review of the above enumerated pleadings, interrogatories and answers to interrogatories, affidavits and various exhibits, the Court of Appeals affirmed the summary judgment rendered by the District Court against Overmyer on the first and second counts of its complaint. Petitioners respectfully submit that the Court of Appeals erred in so doing for the reason that it is undisputed in the record that there was no meeting of the minds of the parties, nor could there have been, as to the amount of Overmyer's indebtedness to Loflin, the nature of the services rendered Overmyer by Loflin or Loflin's rate of charge therefor.

Essential to the consummation of a valid and binding accord and satisfaction are all of the elements requisite to a valid contract. The discharge of claims by way of accord and satisfaction must be supported by a sufficient consideration and the parties thereto must *mutually assent* to its execution. 3 C.J.S., *Accord and Satisfaction*, Section 3(a).

The record is replete with instances of glaring inconsistences in the account stated on Loflin's two subcontracts with Overmyer, compelling the conclusion that neither of them could possibly have known the amount of the indebtedness on May 31, 1967, the date of the alleged compromise settlement and accord and satisfaction thereof, and therefore could not have mutually assented thereto. As clearly shown by the record, the overpayments which are the basis of Overmyer's claims

against Loflin, as stated in the first and second counts of its complaint, were made through inadvertence and mistake and in reliance upon Loflin's representations that the same were due and owing, and neither Green & White nor Overmyer agreed to or contemplated a compromise settlement and accord and satisfaction. See 6 Corbin *Contracts*, Section 1292 at Page 177. See also *Roberts vs. Finger*, 227 Miss. 671, 86 So. 2d 463 (1956) wherein the Court stated:

> "One of the essential elements of an accord and satisfaction is an agreement, or a meeting of the minds of the parties. This agreement must have all the essentials of a contract and may be express, or implied from the circumstances . . . Whether the payee knew, or should have known, what claim or account was intended to be satisfied is to be determined from all of the surrounding circumstances attending the parties and the transactions involved."

It is further submitted that Loflin has completely failed to sustain the burden of proving a valid and binding accord and satisfaction, although he has this burden. See 6 Corbin *Contracts*, Section 1280, Page 134:

> "Accord and satisfaction is properly called an affirmative defense; it must be specially pleaded and *the burden of proof with respect to every necessary element of it is on the party alleging it as a defense.*" (Emphasis supplied)

This section was cited by the Mississippi Supreme Court in *Simmons vs. Langston*, 241 Miss. 749, 128 So.2d 749 (1961), wherein the Court stated in part:

> "The burden of proving an accord and satisfaction is upon the one who maintains the affirmative of that

issue. It is said the evidence must be 'clear and unequivocal' in order to support such a finding . . ."

A case strikingly similar to the one at bar and involving one of the same parties was recently considered by the Court of Appeals of Georgia. In *D. H. Overmyer, Inc. vs. Joe Summers Roofing Company, Inc.*, 120 Ga. App. 188, 169 S. E. 2d 821 (1969), Summers sued Overmyer for the balance due on a note, and Overmyer answered that the note was executed under a mistake of fact inasmuch as the parties thought Overmyer owed Summers a larger amount than he really did, and by a counterclaim Overmyer sought to reclaim excess sums paid Summers by mistake. Summers moved for summary judgment and produced evidence showing that it, as subcontractor, had previously brought suit against a general contractor and Overmyer, a landowner, to recover the balance due on several subcontracts it had with the subcontractor and to foreclose labor and material liens against the property of Overmyer. Overmyer gave the note sued on pursuant to a settlement agreement in consideration of the dismissal of the former proceeding and cancellation of the claims of lien. From a grant of summary judgment against it Overmyer appealed. In reversing the judgment of the lower court, the Court of Appeals of Georga stated:

"A compromise or mutual accord and satisfaction is binding on both parties. Code § 20-1205. The mistake of a party to a settlement contact will not render the contract invalid when the mistake was the result of that party's negligence. See Code §§ 37-116, 37-211; Dyar v. Walton, Whann & Co., 79 Ga. 466, 470, 7 S.E. 220; Holton Dodge, Inc. v. Baird, 118 Ga. App. 316, 317, 163 S.E.2d 346. However, it is generally agreed that a settlement contract based on a mistake

of material fact, where the mistake was not due to the negligence of the party claiming mistake and where it did not pertain to a fact in dispute, may be invalidated on that ground like other agreements. See Collins v. Collins, 165 Ga. 198 (4), 140 S.E. 501; Richard v. Scibert, 38 Ga. App. 76, 142 S. E. 755; 15 Am. Jur. 2d 969, Compromise and Settlement, § 35. 'If the consideration be founded in a mistake of fact or of law, the promise founded thereon cannot be enforced.' Code § 20-308."

Also in *Overmyer,* the Court concluded:

"The evidence on motion for summary judgment did not show whether or not the claim in the former proceeding was disputed in whole or in part. In other words the evidence did not show that there was a dispute as to the particular amount of the claim in controversy. Thus it does not appear that the alleged mistake pertained to a matter that was disputed or believed to be uncertain or that was intended to be resolved through the alleged compromise. Instead, Overmyer's answer showed that the mistake was a mutual one and that it arose through the subcontractor's omission to credit some payments against the balance due on the contracts between the general contractor and the subcontractor.

"On the motion for summary judgment plaintiff as movant had the burden to show the absence of any genuine issue of material fact. The movant has this burden even as to issues upon which the opposing party would have the trial burden. Colonial Stores v. Turner, 117 Ga.App. 331, 333, Roebuck & Co., 118 Ga. App. 205, 206, 163 S.E.2d 256; 6 Moore's Federal Practice (2d Ed.) 2853, § 56.23. *Proof merely that the*

note was given pursuant to a settlement agreement was not sufficient. It was incumbent upon plaintiff to support the motion with evidence showing that in fact there was no mistake or that the mistake was made under circumstances in which it would not afford a defense.'' (Emphasis supplied)

In the instant case, Loflin's subcontracts called for written approval of both the owner and general contractor for extra work, and the record shows, without dispute, that Loflin made considerable charges for additional work which was not authorized in the prescribed manner. The O'Brien affidavit specifically denies the authority of either the general contractor's job superintendent, its construction representative, or the owners' supervising engineer to waive the contract provision for written change orders, and there is therefore presented in the record of this cause a material issue of fact for trial as to this matter.

And Overmyer respectfully submits that in view of the genuine issues of material fact heretofore set forth herein, the Court of Appeals erred in affirming the summary judgment rendered by the District Court for Loflin on the first and second counts of Overmyer's complaint.

Overmyer has stated a cause of action against Loflin and is entitled to the relief sought in the first and second counts of his complaint. Loflin, on the other hand, has totally failed to sustain his burden of proving a compromise settlement and accord and satisfaction of Overmyer's claims in the first and second counts of its complaint.

Judge Hutcheson, speaking for the Court of Appeals for the Fifth Circuit in *Whitaker vs. Coleman,* 115 F.2d

305 (5th Cir. 1940) enunciated the guiding principles for summary judgment procedure as follows:

> " . . . The invoked procedure, valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.
>
> ". . . To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force . . . .
>
> ". . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

In *Shahid v. Gulf Power Company,* 291 F. 2d 422 (5th Cir. 1961), the Court stated in pertinent part as follows:

> "Before rendering summary judgment the district court must determine both (1) 'that there is no genuine issue as to any material fact' and (2) 'that the moving party is entitled to a judgment as a matter of law.' Rule 56 (c), Federal Rules of Civil Procedure. Requisite (2) does not automatically follow from requisite (1).

"In Palmer v. Chamberlin, 5 Cir., 1951, 191 F.2d 532, 540, 27 A.L.R.2d 416, we said:

> '. . . before rendering judgment the Court must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law. Where, as in this case, the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for a summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law.' "

Overmyer respectfully requests that these principles be applied to the case at bar.

II

OVERMYER IS ENTITLED TO RECOVER OVERPAYMENTS TO RESPONDENT WHICH IT MADE UNDER THE INFLUENCE OF A MISTAKE OF AN EXISTING MATERIAL FACT.

In its Findings and Conclusions (R. 280) the District Court found that "the alleged overpayments sued for by Plaintiff were voluntary payments and cannot be recovered back." (R. 282-283) Overmyer, in its Complaint (R. 3) alleges in the first count overpayments to Loflin under Subcontract No. 2722 in the amount of $19,082.72 and states that the same were made through inadvertence and mistake and that Overmyer was induced to make the same in reliance upon representations by Loflin that the same were due and owing (R. 6). Precisely the same allegations are made with respect to

overpayments in the amount of $4,699.30 under Subcontract No. 2736 in the second count (R. 7).

It has been the law in Mississippi, as well as in a majority of the juisdictions of our country, for years, that where money is paid under the influence of a mistake of fact, and the payer would not have paid it had he known otherwise, the money may be recovered. In *Bank of Belmont v. Judson Lumber Co.*, 143 Miss. 86, 108 So. 440 (1926), it was held that where the lumber company paid the bank on invoice for lumber and by mistake paid for two cars although it only had an assignment for the proceeds of one, the lumber company might recover the over payment. The Court stated:

> "Money paid to another by mistake of fact, although such mistake may have been caused by the payer's negligence, may be recovered from the person to whom it was paid, in an action for money had and received. *Bank of Louisiana v. Ballard,* 7 How. 371; *Holden v. David,* 57 Miss. 769; 21 R.C.L. 167; 30 Cyc. 1321. The ground on which such recovery is allowed is that one receiving money paid to him by mistake should not be allowed to enrich himself at the expense of the party who paid the money to him by retaining it, but in equity and good conscience should refund it. * * *"

In 70 C.J.S., *Payment,* Section 157 at Page 367, the general rule is stated as follows:

> "As a general rule, a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, even though made during the pendency of a suit on the demand. The right of recovery under such circumstances is known to the civil and Roman law, as well as to the common law, and is bottomed on the equitable doctrine

that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to repay. The rule ordinarily applies to payments made to or by public and governmental agencies as well as private persons."

And see Restatement, *Restitution,* Section 20, at page 92:

"A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess."

Overmyer therefore respectfully submits that it is entitled to recover from Loflin such overpayments as it is able to prove it made under the influence of a mistake of an existing material fact, such mistake of fact being that the sums overpaid were due and owing. It is submitted, therefore, that summary judgment should not have been entered against Overmyer on the first and second counts of its complaint herein.

CONCLUSION

For all of the foregoing reasons petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeal for the Fifth Circuit to review its judgment affirming the summary judgment rendered by the District Court for respondent against petitioners.

Respectfully submitted,

JOHN H. PRICE, JR.
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Attorney for Petitioners

THOMAS, PRICE, ALSTON, JONES & DAVIS
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Of Counsel

CERTIFICATE OF SERVICE

I, John H. Price, Jr., attorney of record for the petitioners in the above cause, hereby certify that I have this day served the foregoing petition, together with the appendices thereto, by mailing three copies thereof, properly addressed, with United States first class postage prepaid, to each Honorable Alfred N. Crisler, 431 Tombigbee Street, Jackson, Mississippi 39201, and Honorable Rufus Broome, Attorney at Law, Highway 80 East, Jackson, Mississippi 39208, they being the attorneys for the respondent.

This the 22nd day of July, 1971.

APPENDIX A.

Opinion of The Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30401

D. H. OVERMYER CO., INC.,
Plaintiff-Appellant,

versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY,
Defendant-Appellee,

versus

D. H. OVERMYER CO., INC. (A Mississippi Corporation),
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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(April 5, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

CLARK, Circuit Judge: D. H. Overmyer Co., Inc., an Ohio corporation, plaintiff below, and D. H. Overmyer Co., Inc., a Mississippi corporation, third-party defendant, [hereinafter collectively Overmyer], appeal

from a summary judgment in favor of defendant, John T. Loflin, on Counts 1 and 2 of plaintiff's complaint and a joint judgment against plaintiff and third-party defendant on Loflin's counterclaim after a trial to the court on the merits. Both the summary and the plenary judgments were based upon the fact that the parties had entered into an accord and satisfaction of a disputed claim. We affirm.

Briefly, the facts are these. Overmyer entered into a prime contract with Green & White Construction Company to construct a warehouse in Jackson, Mississippi. Green & White subcontracted a portion of its undertaking to Loflin. In the written subcontract document Loflin agreed that all work order changes would be in writing. During the course of the construction, Loflin delivered materials and performed services pursuant to oral work order changes which he contends were authorized, required and approved by the job superintendent for Green & White. Subsequently, Green & White fell behind in their progress payments, and another subcontractor filed suit in a Mississippi state court on Green & White's performance and payment bond. Loflin joined in the suit, as required by Mississippi law[1]. Overmyer determined to take over and complete the contract of Green & White and therefore undertook to dispose of the pending litigation and its associated lien claims. In consideration for Loflin's acceptance of a partial deferred payment, release of the liens he held against Overmyer's property, and dismissal of his state court suit with prejudice, Overmyer agreed to settle Loflin's claim against Green & White by paying 10,000 dollars and issuing a note to Loflin for approximately 20,000

[1] *Miss. Code Ann.* § 377 (1942)

dollars. At the same time, Green & White assigned to Overmyer all claims it might have against Loflin. Some thirteen months after this settlement and assignment, Overmyer filed the present suit against Loflin seeking to recover all payments that were made because of work done under oral work order changes.[2] Loflin defended on the ground that the settlement agreement was an accord and satisfaction of all claims that Overmyer held against Loflin. Loflin counterclaimed for the unpaid balance due on the note. The judgments and this appeal therefrom eventuated.

Overmyer asserts five points of error in this appeal. First, he argues that Loflin did not sustain his burden of proving an accord and satisfaction. The record demonstrates there is no merit to this contention. Second, Overmyer contends that there was no dispute as to the amount owed to Loflin, and that Loflin was paid exactly what he claimed was owed to him. From this assertion, Overmyer urges that no accord and satisfaction resulted from the mere payment of an undisputed debt. The record again clearly shows that there was no genuine issue of fact as to the existence of a dispute between Loflin on the one hand and Green & White and Overmyer on the other, as to the amount owed to Loflin, and Overmyer's counsel conceded on oral argument that such a dispute in fact existed. As an adjunct to this argument, Overmyer contends that there was no mutual assent to the accord and satisfaction because neither party knew the amount owed to Loflin. But this contention misconceives the office of an accord and satisfaction. Settlement agreements are highly favored

[2]A third count sought to recover for the value of work alleged to be defective. It was severed by the court below and is in no wise involved on this appeal.

in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits. Thus the presence of an uncertainty here supports rather than detracts from the vitality of this settlement. *See Browne v. Merchants Co.*, 186 Miss. 398, 191 So. 58 (1939); *W. J. Perryman & Co. v. Penn Mutual Fire Ins. Co.*, 324 F.2d 791 (*5th* Cir. 1963); 15 Am.Jur.2d Compromise and Settlement § 11 (1964).

Next Overmyer argues that the payments to Loflin were made through inadvertence and a mistake of fact, and that such inadvertence and mistake vitiated any accord and satisfaction that might otherwise have resulted. The district court held and the record clearly indicates that "[t]he Plaintiff has made no showing whatsoever of any mutual mistake of fact by the parties to the settlement agreement. The only showing made by the Plaintiff, assuming the truth of its affidavit in evidence, is a unilateral negligent mistake on its part in making said payment on May 31, 1967, which furnishes no legal basis for it avoiding the effect of such settlement." The evidence shows that the parties and their attorneys carried on negotiations for settlement of the amount due Loflin over an extended period of time. In addition, both Overmyer and Green & White had engineers and a superintendent on the job which provided the opportunity for Overmyer to acquire knowledge as to the extent of his liabilities.

Finally, Overmyer argues that a provision written into the settlement agreement should permit him to recover the payments made to Loflin which were unsupported by documented change orders. The provision states that "[t]he undersigned [Loflin] under-

stands and agrees, however, that his warranties and agreements, as set out in his contracts with Green & White Construction Co., shall remain in full force and effect and D. H. Overmyer Co., Inc. (Miss.) and D. H. Overmyer Co., Inc. (Ohio) may credit to any payments due under said note any damage by either of them sustained by reason of breach of any such warranty or agreement." Overmyer then notes one of the agreements in the contract between Green & White Construction Co. and Loflin was that all work order changes would be in writing. Overmyer argues that all work claimed for under oral change orders was in breach of the agreement and resulted in Overmyer's overpayments. Hence, it contends, that under the recited provision, a recovery may be obtained for these overpayments.

The recited provision, however, does not speak in terms which contemplate a right of recovery of payments already made, but only allows credits against payments due under the note. Thus, this provision could only have been used as a defense against Loflin's counterclaim to collect on the note. It is clear that Overmyer neither pleaded nor raised this defense at any stage of the trial court proceedings. In fact, Overmyer did not even appear at the hearing on Loflin's counterclaim and made no active contest of the counterclaim. If Loflin had a defense to this contention, such as express waiver by an authorized agent or ratification, he was never called on to present such proof.

In the absence of exceptional circumstances where a miscarriage of justice would result, a condition not present here, questions that were not presented to or passed on by the trial court will not be considered on

appeal. *Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc.*, 414 F.2d 872 (5*th* Cir. 1969); *B & G Electric Co. v. G. E. Bass & Co.*, 252 F.2d 698 (5*th* Cir. 1958). *See also J. F. White Construction Co. v. New England Tank Industries*, 393 F.2d 449 (1*st* Cir. 1968).

Therefore, both the summary judgment and judgment on the counterclaim must be

AFFIRMED.

APPENDIX B.

Judgment of The Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30401

D. C. Docket No. 4369

D. H. OVERMYER CO., INC.,
Plaintiff-Appellant,

versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY,
Defendant-Appellee,

versus

D. H. OVERMYER, CO., INC. (A Mississippi Corporation),
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant and third-party defendant-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 5, 1971

Issued As Mandate:

APPENDIX C.

Order of The Court of Appeals Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 30401

D. H. OVERMYER CO., INC.,
Plaintiff-Appellant,

versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY,
Defendant-Appellee,

versus

D. H. OVERMYER CO., INC. (A Mississippi Corporation),
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

(May 20, 1971)

ON PETITION FOR REHEARING

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D.

Findings and Conclusions of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 4369

D. H. OVERMYER CO., INC.,

Plaintiff,

versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY,

Defendant,

versus

D. H. OVERMYER CO., INC. (A Mississippi Corporation) D. H. OVERMYER,

Third Party Defendants.

FINDINGS AND CONCLUSIONS OF THE COURT ON MOTION OF DEFENDANT FOR SUMMARY JUDGMENT ON COMPLAINT AND COUNTERCLAIM

This case is before the Court on Motion of the Defendant Loflin for:

(1) Summary judgment in his favor as Defendant on the Complaint filed against him by the Plaintiff, D. H. Overmyer Co., Inc. (an Ohio Corporation); and

(2) Summary judgment in his favor on his Counterclaim against Plaintiff and Third Party Defendant, D. H. Overmyer Co., Inc. (A Mississippi Corporation). Plaintiff is hereinafter sometimes referred to as "Overmyer" and Defendant and Counterclaimant as "Loflin".

The Complaint filed by the Plaintiff is in three counts. The first count seeks recovery for $19,082.72 on an alleged overpayment to the Defendant on a Subcontract numbered 2722 for dirt work and site work performed by Defendant for Green & White Construction Company, Inc., prime contractor for the Plaintiff on a warehouse facility which was being built in Hawkins Field Industrial Park in Jackson, Mississippi. The second count is for recovery in the amount of $4,699.30 for an alleged overpayment to the Defendant on a second Subcontract numbered 2736 for clay gravel base and asphalt topping work performed by Defendant on said project. The third count seeks recovery of $10,000.00 for certain alleged defects in the paving work performed by Defendant which became apparent during the guarantee period provided in his Subcontract. Defendant answered denying any overpayment on the Subcontracts described in Counts 1 and 2 and plead in defense to these Counts that the Plaintiff was barred, estopped and prohibited by law from bringing such action for alleged overpayments because:

(1) The Defendant Subcontractor, the prime contractor and Plaintiff entered into a compromise settlement and an accord and satisfaction with reference to said subject matter on May 31, 1967; and

(2) Any such alleged overpayment was a voluntary payment and cannot be recovered back.

Appendix D

With reference to Count 3 of the Complaint, Defendant denied any defective work by Defendant and alleged further that the prime contractor had forceably directed Defendant to install the asphalt topping at a time when the clay gravel base was too wet for such work and that Defendant had performed such work only after having been given a release of contract and guaranty obligations thereon.

Defendant, by way of counterclaim, alleged that the Plaintiff and Third Party Defendant had as a part of the compromise settlement and accord and satisfaction aforementioned executed in favor of Defendant a Promissory Note in the amount of $20,094.48 on May 31, 1967 and made payments to him on said Note through January 30, 1968, after which time there was default by said parties, leaving them indebted to Defendant on said Note for $16,831.68 plus interest. The Plaintiff and Third Party Defendant answered the Note counterclaim admitting the execution of the Note and the default in payment of the Note and the amount of the balance owing, but denying liability thereon because of the setoffs alleged in the Complaint.

After review of the pleadings, Interrogatories and Answers to Interrogatories, Affidavits and other documents submitted for consideration on said Motion, the Court is of the opinion and finds that:

(1) The Plaintiff owner, the prime contractor and the Defendant Subcontractor Loflin on May 31, 1967, entered into and consummated a valid and binding compromise settlement and accord and satisfaction as to the amount owing the Defendant Subcontractor for his work under said Subcontracts as set forth in the "Second Amendment to Answer of Defendant" on file herein.

Such compromise settlement and accord and satisfaction now bar, estop and preclude Plaintiff from maintaining the actions for overpayment contained in Counts 1 and 2 of the Complaint in the absence of proof of mistake, error, inadvertence, misrepresentation or fraud, which constitute legal grounds to disregard, invalidate or set aside such compromise settlement.

(2) There has been no showing of any mistake, error, inadvertence, misrepresentation or fraud which would constitute legal grounds to disregard, invalidate or set aside such compromise settlement.

(3) The alleged overpayments sued for by Plaintiff were voluntary payments and cannot be recovered back.

(4) There is no genuine issue of material fact for trial with reference to the matters set forth in Paragraphs 1, 2 and 3 herein.

(5) There is a disputed question of fact between the parties with reference to the liability vel non of the Defendant to the Plaintiff under the allegations of Count 3 of the Complaint involving the claim for damages on account of defective work on the blacktop.

Even though the Plaintiff owner asserts by way of conclusion that there was no compromise settlement or accord and satisfaction made with the Defendant Subcontractor Loflin on May 31, 1967, the evidence before this Court shows without dispute the contrary. Prior to May 31, 1967, the Defendant Loflin had filed suit in the Chancery Court of the First Judicial District of Hinds County, Mississippi against Plaintiff and against the prime contractor, Green & White Construction Company, Inc. for the monies owed to him at that time for work performed under the two Subcontract Agreements.

Said suit was then pending between the parties in State Court, and the parties were each represented by counsel therein. There existed disputes between the parties with reference to the amounts owing the Defendant Subcontractor for his work. All work under said Subcontracts had then been performed and completed. The Plaintiff owner and the prime contractor then knew or were by law charged with knowledge as to the extent of their liabilities to the Defendant for such work, the job being then complete. The parties and their attorneys carried on negotiations for settlement of the amount due the Subcontractor over an extended period of time. Against this background, the parties made, entered into and consummated the compromise settlement and accord and satisfaction as set forth in Defendant's Answer on May 31, 1967. The Defendant in addition to acknowledging settlement of all amounts owing to him for his Subcontract work and releasing his claim for excess amounts above that sum prejudicially changed his position, relying on said settlement by waiving his contractor's lien against the land and improvements involved and dismissing with prejudice his pending suit in State Court on said claims.

Under the laws of the State of Mississippi, the agreement of the parties entered into on May 31, 1967 constituted a valid and binding contract of settlement and accord and satisfaction and merged therein the prior claims and disputes between the parties with reference to the subject matter, and the Plaintiff owner is now barred by such settlement from maintaining its actions in Counts 1 and 2 of the Complaint.

The Plaintiff asserts by way of conclusion that neither it nor its prime contractor had knowledge prior to the

settlement of May 31, 1967 that certain extra work invoiced by the Defendant Subcontractor was not properly authorized under the terms of the Subcontracts, that the quantities claimed by Defendant on its invoices for asphalt paving were greater than actually earned under the Subcontracts, and that the quantities claimed by Defendant for select fill and common excavation on his invoices were excessive. Plaintiff asserts that it and its prime contractor paid the Defendant on said invoices through mistake and inadvertence because at the time it lacked knowledge of the right to claim offsets against the Defendant Subcontractor for these matters and that it made such payments because of the representations which Defendant Subcontractor made on such invoices. Because of this, Plaintiff contends that the settlement of May 31, 1967 is not binding upon it and that it still has the right to recover for this alleged overpayment against Defendant.

It is undisputed from this record that the prime contractor's building superintendent on the job, W. A. Weathersby, acting for and on behalf of the prime contractor, authorized the extra work which Defendant performed; that such extra work was invoiced on progress billings through the course of the job to the prime contractor and the Defendant was paid progress payments therefor by the prime contractor and owner; that the Plaintiff and the pime contractor prior to the settlement had full knowledge of the amounts claimed by the Defendant Subcontractor for extra work and for quantities on excavation, select fill and asphalt paving under the Subcontracts; that the Plaintiff owner and prime contractor, in addition to having a construction superintendent representing them on the job at all times,

also had engineers inspecting and reporting on the work; that by admission of Plaintiff in the Affidavit of Kenneth P. O'Brien, on March 24, 1967 and on April 6, 1967, the Contractor's Purchasing Committee had considered the Defendant Subcontractor's claims for extra work as set forth on his invoices and made a decision to reject such claims; that the Subcontractor was not in any fiduciary relationship to the prime contractor or the Plaintiff owner, and said owner and contractor by virtue of their position and the matters aforementioned are legally chargeable with the knowledge which they claim not to have known at the time of the settlement.

The decision of the Mississippi Supreme Court in *McDaniel Bros. Construction Co. v Burk Hallman Co.* (Miss. 1965), 175 So. 2d 603, is peculiarly applicable here, insofar as there being no legal basis for the recovery of the voluntary payment.

> "[4, 5] As said in McLean, there is no hardship in the rule regarding voluntary payments and its foundation rests among the fundamentals of judicial procedure. The rule precludes the Court being occupied in undoing the arrangements of parties, which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities. Graham McNeil Co. v. Scarborough, 135 Miss. 59, 99 So. 502 (1924). And in McLean, the Court added that the basic purpose of judicial courts in civil cases is to extend aid to those who have not been able by lawful means to aid themselves. Courts of equity make no exertion to extend relief to those who, being able to take care of their interests, have neglected to do so, and

thereupon find themselves in predicaments which ordinary care would have avoided. Prime Contractor was in a position to know or to ascertain the true facts concerning the performance by Subcontractor of its contract, and voluntarily placed itself in the predicament from which it seeks disentanglement. Under our authorities it has no right to relief. Cf. Nicholas v. Deposit Guaranty Bank, supra."

The Plaintiff has made no showing whatsoever of any mutual mistake of fact by the parties to the settlement agreement. The only showing made by the Plaintiff, assuming the truth of its affidavit in evidence, is a unilateral negligent mistake on its part in making said payment on May 31, 1967, which furnishes no legal basis for it avoiding the effect of such settlement.

The Court directs counsel to present to the Court for entry an appropriate Order sustaining the Motion for Summary Judgment as to Counts 1 and 2 of the Complaint, but overruling the Motion as to Count 3 of the Complaint and that portion of the Motion seeking summary judgment on the counterclaim.

This, 2nd day of July, 1970.

S/ Harold Cox
UNITED STATES DISTRICT JUDGE

APPENDIX E.

Final Judgment of The District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 4369

D. H. OVERMYER CO., INC.

Plaintiff,

Versus

JOHN T. LOFLIN, doing business as LOFLIN SAND & GRAVEL COMPANY

Defendant,

Versus

D. H. OVERMYER CO., INC. (A Mississippi Corporation) D. H. OVERMYER

Third Party Defendants.

FINAL JUDGMENT

This day this cause having come on for trial before the Court without a jury on Counterclaim of the Defendant, John T. Loflin, against the Plaintiff, D. H. Overmyer Co., Inc., an Ohio corporation, and against Third Party Defendant, D. H. Overmyer Co., Inc, a Mississippi corporation, and the Court having heard and considered the evidence and testimony and being of the opinion and finding that the Defendant, John T. Loflin, is entitled to judgment against the Plaintiff and Third Party Defendants for the sum of $_____, representing principal on the note indebtedness sued on in the amount of $19,287.77 and interest thereon through this date.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendant, John T. Loflin, do have and recover of and from the Plaintiff, D. H. Overmyer Co., Inc., an Ohio corporation, and Third Party Defendant, D. H. Overmyer Co., Inc., a Mississippi corporation, the sum of $19,287.77, together with interest at the legal rate from and after this date until paid, and all costs accrued herein, and judgment is hereby rendered accordingly.

The Court having heretofore heard and entered its Order on Motion of the Defendant for summary judgment herein, and it now being appropriate that final judgment be made and entered on said prior order of this Court, it is ordered and adjudged by this Court that the Plaintiff, D. H. Overmyer Co., Inc., an Ohio corporation, take nothing of and from the Defendant, John T. Loflin, on the First and Second Counts of the Complaint and final judgment is here rendered in favor of Defendant as to the First and Second Counts of the Complaint against him. Motion ore tenus having been made by Plaintiff and Third Party Defendant for leave to appeal this judgment with supersedeas and the Court being of the opinion that such Motion should be sustained, it is further ordered and adjudged that appeal with supersedeas be, and the same is hereby, granted upon the filing of bond with sufficient sureties as required by law to be approved by this Court in penal sum of 125% of the amount of the money judgment rendered herein.

ORDERED AND ADJUDGED this 7th day of July, 1970.

S/ Harold Cox
UNITED STATES DISTRICT JUDGE

APPENDIX F.

Rule 56, Federal Rules of Civil Procedure

Rule 56.

SUMMARY JUDGMENT

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon

the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.